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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

FADUMO ABDILLAH GULED, Plaintiff and Appellant, v. WESTERN DENTAL SERVICES, INC., Defendant and Respondent.	F076810 (Super. Ct. No. 16CECG03528) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Fresno County. Rosemary T. McGuire, Judges.

Fadumo Abdillah Guled, in pro. per., for Plaintiff and Appellant.

Zaro & Sillis and Michael James Snoke for Defendant and Respondent.

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[*] Before Levy, Acting P.J., Detjen, J. and DeSantos, J.

Appellant, Fadumo Abdillah Guled,[1] filed an action against respondent, Western Dental Services, Inc. (Western Dental), for performing negligent dental work causing injury. Respondent filed three demurrers, each alleging the complaint was filed after the one-year statute of limitations expired, and appellant had not alleged that the injuries were discovered at a later time as to toll the limitations period. The court sustained the first two demurrers with leave to amend, but after determining that appellant had yet again failed to articulate why the cause of action was timely in her second amended complaint, sustained the third and final demurrer without leave to amend and entered judgment.

Appellant alleges the trial court should not have sustained the third demurrer without leave to amend as there was a reasonable possibility appellant could allege facts to support tolling the limitations period based on delayed discovery. We agree and reverse.

FACTUAL AND PROCEDURAL BACKGROUND

On October 27, 2015, Dr. William Murphy, a dentist at Western Dental, extracted several of appellant's teeth. After the procedure, appellant experienced significant pain. She returned to the dentist 10 days later and requested pain medication. Appellant complained the bone in the lower part of her jaw was painful, her dentures would no longer stay in place, and she had difficulty eating. She was informed, during that visit, that Murphy was fired from Western Dental based on failing to competently perform dental work. Appellant went to a dental specialist who estimated it would cost $45,000 to repair the damage caused by Murphy.

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[1] Much of the record, including the judgment, shows appellant's name as Guled Fadumo Abdillah. As confirmed at oral argument, appellant's true name is Fadumo Abdillah Guled.

Additionally, appellant's native language is Somali. She communicated with the court at oral argument through an interpreter provided by the court.

Appellant filed a complaint containing the above facts and alleging negligence against Western Dental on November 2, 2016, one year and six days after the procedure, but within one year of the return visit 10 days after the procedure. Western Dental filed and the court sustained a demurrer to the complaint, providing appellant leave to file an amended complaint. The court explained that the limitations period expired within one year of appellant discovering, or when appellant using reasonable diligence, should have discovered the injury. The trial court found that based on the allegations in the complaint, appellant discovered, or should have discovered, her injuries on the date the procedure was performed. However, the court provided her leave to amend "so that [appellant] can attempt to allege a factual basis to toll the running of the statute of limitations."

On June 14, 2017, appellant filed an amended complaint again naming Western Dental, but also naming Murphy for the first time. Appellant alleged Murphy negligently performed a tooth extraction resulting in the loss of gum and bone. While appellant alleged the injury, she did not include allegations in the amended complaint regarding her inability to discover her injuries immediately after the procedure. The court issued a tentative ruling in which it sustained the demurrer without leave to amend against Murphy because the amended complaint did not relate back to the original complaint. However, the court found with regard to the discovery of the injuries and the commencement of the statute of limitations as to Western Dental, the court deemed it reasonable that a lay person would not equate the resulting pain for the six days following a dental procedure to an injury. As questions of fact existed as to when appellant discovered the injury, the court reasoned the action against Western Dental could not be decided on demurrer.

However, after taking the matter under submission, the court changed course and sustained the demurrer against appellant. The court held the allegations, as alleged, inferred that appellant had discovered her injury on the date of the procedure. However,

the court provided appellant "one more chance" to amend the complaint to attempt to allege a factual basis to support tolling the statute of limitations.

Appellant filed a second amended complaint on October 2, 2017. In the second amended complaint, appellant alleged that she went back to Western Dental on September 6, 2017, and was informed Murphy had been terminated.[2] She also alleged that on December 14, 2017, she went to another dentist and it was discovered Murphy injured her gums and bone during the procedure.[3] Western Dental filed a demurrer to the second amended complaint. In the demurrer, it argued appellant omitted prior allegations to attempt to evade the statute of limitations and that the facts, as alleged, continue to indicate she knew or should have known about her injury at the time of the procedure.

On December 6, 2017, the court sustained the demurrer without leave to amend. The court noted that appellant failed to comply with the court's prior orders to include a factual basis for the tolling of the statute of limitations. The court explained that appellant had been provided two earlier opportunities to state a factual basis for the tolling of the statute of limitations but failed to do so. The court therefore assumed that appellant would be unable to make such allegations and providing further opportunity to amend would be futile. The court entered judgment on January 17, 2018, to which appellant appeals.[4]

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[2] This date appears to be an error. Based on appellant's original complaint, she had the extraction on October 27, 2015, and, 10 days later, returned due to pain. It was then that she was advised Murphy was fired for "damaging a[]lot of people." That would have been on November 6, 2015, not September 6, 2017.

[3] This date also appears to be an error. Attached to the second amended complaint is an exhibit consisting of a letter from the other dentist indicating her visit occurred on December 14, 2016. "[T]o the extent the factual allegations conflict with the content of the exhibits to the complaint, we rely on and accept as true the contents of the exhibits." (*Barnett v. Fireman's Fund Ins. Co.* (2001) 90 Cal.App.4th 500, 505.)

[4] On appeal, appellant does not challenge the dismissal of her claims against Murphy.

DISCUSSION

I. Standard of Review

A demurrer is properly sustained when "[t]he pleading does not state facts sufficient to constitute a cause of action." (Code Civ. Proc., § 430.10, subd. (e).) "The absence of any allegation essential to a cause of action renders it vulnerable to a general demurrer. A ruling on a general demurrer is thus a method of deciding the merits of the cause of action on assumed facts without a trial. [Citation.]" (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 437, fn. 4.)

" 'In reviewing an order sustaining a demurrer, we examine the operative complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory.' " (*King v. CompPartners, Inc.* (2018) 5 Cal.5th 1039, 1050 (*King*), quoting *T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 162.) When a demurrer "is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) The burden is on plaintiff to prove that amendment could cure the defect. (*King*, *supra*, 5 Cal.5th at p. 1050.)

"When reviewing a judgment dismissing a complaint after the granting of a demurrer without leave to amend, courts must assume the truth of the complaint's properly pleaded or implied factual allegations." (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) "In addition, we give the complaint a reasonable interpretation, and read it in context." (*Ibid.*) We similarly accept as true the contents of exhibits attached to the complaint. (See, e.g., *Barnett v. Fireman's Fund Ins. Co.* (2001) 90 Cal.App.4th 500, 505; *Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94 ["[E]videntiary facts found in recitals of exhibits attached to a complaint or superseded complaint . . . can be considered on demurrer."].)

II. Analysis

A. Statute of Limitations for Medical Malpractice

Appellant brought a single claim for professional negligence. Medical providers must exercise that degree of skill, knowledge, and care ordinarily possessed and exercised by members of their profession under similar circumstances. (*Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 122; *Barris v. County of Los Angeles* (1999) 20 Cal.4th 101, 108, fn. 1.) Thus, in " 'any medical malpractice action, the plaintiff must establish: "(1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence." [Citation.]' " (*Hanson v. Grode* (1999) 76 Cal.App.4th 601, 606.)

Code of Civil Procedure section 340.5 establishes the statute of limitations in medical malpractice lawsuits. It reads in part: "In an action for injury or death against a health care provider based upon such person's alleged professional negligence, the time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first. In no event shall the time for commencement of legal action exceed three years unless tolled for any of the following: (1) upon proof of fraud, (2) intentional concealment, or (3) the presence of a foreign body, which has no therapeutic or diagnostic purpose or effect, in the person of the injured person." (*Ibid*.)

The one-year provision begins when the " 'plaintiff suspects or should suspect that [his or] her injury was caused by wrongdoing . . . .' " (*Garabet v. Superior Court* (2007) 151 Cal.App.4th 1538, 1545; see *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1110 (*Jolly*).) "With regard to the one-year limitation provision, the issue on appeal usually is whether the plaintiff actually suspected, or a reasonable person would have suspected,

that the injury was caused by wrongdoing. [Citation.]" (*Garabet, supra,* 151 Cal.App.4th at p. 1545.)

For purposes of the statute, "[t]he word 'injury' signifies both the negligent cause and the damaging effect of the alleged wrongful act and not the act itself. (*Larcher v. Wanless* (1976) 18 Cal.3d 646, 655-656 & fn. 11.)" (*Steketee v. Lintz, Williams & Rothberg* (1985) 38 Cal.3d 46, 54.) There must be some manifestation of appreciable harm. (*Brown v. Bleiberg* (1982) 32 Cal.3d 426, 437, fn. 8.) "The date of injury could be much later than the date of the wrongful act where the plaintiff suffers no physical harm until months or years after the wrongful act. [Citation.]" (*Steketee v. Lintz, Williams & Rothberg, supra,* 38 Cal.3d at p. 54, fn. omitted.)

By establishing a maximum length of time in which plaintiffs have to bring their medical malpractice lawsuits, "the Legislature had as a primary goal the reduction of the cost of medical malpractice insurance. However, this goal was to be accomplished in a 'reasonable' manner. . . . '[T]he statute appears to have been a compromise between concern over the extended exposure of medical practitioners to malpractice liability and a desire not to bar potentially worthy plaintiffs from court before they have a fair chance to bring suit. . . .' [Citation.]" (*Steketee v. Lintz, Williams & Rothberg, supra,* 38 Cal.3d at p. 56.)

B. Application of the Discovery Rule

"The discovery rule provides that the accrual date of a cause of action is delayed until the plaintiff is aware of her injury and its negligent cause. [Citation.] A plaintiff is held to her actual knowledge as well as knowledge that could reasonably be discovered through investigation of sources open to her." (*Jolly, supra,* 44 Cal.3d at p. 1109, fn. omitted; accord, *Nguyen v. Western Digital Corp.* (2014) 229 Cal.App.4th 1522, 1551 (*Nguyen*).)

"Under the discovery rule, the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that

someone has done something wrong to her" (*Jolly*, *supra*, 44 Cal.3d at p. 1110, fn. omitted.) In other words, "the limitations period begins once the plaintiff ' " ' has notice or information of circumstances to put a reasonable person on inquiry . . . .' " ' " (*Id.* at pp. 1110-1111, italics omitted.) "A plaintiff need not be aware of the specific 'facts' necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her." (*Id.* at p. 1111.)

Jolly "sets forth two alternate tests for triggering the limitations period: (1) a subjective test requiring actual suspicion by the plaintiff that the injury was caused by wrongdoing; and (2) an objective test requiring a showing that a reasonable person would have suspected the injury was caused by wrongdoing. [Citation.] The first to occur under these two tests begins the limitations period." (*Kitzig v. Nordquist* (2000) 81 Cal.App.4th 1384, 1391, citing *Jolly*, *supra*, 44 Cal.3d at p. 1110.)

" 'Resolution of the statute of limitations issue is normally a question of fact.' [Citation.] More specifically, as to accrual, 'once properly pleaded, belated discovery is a question of fact.' [Citation.] As our state's high court has observed: 'There are no hard and fast rules for determining what facts or circumstances will compel inquiry by the injured party and render him chargeable with knowledge. [Citation.] It is a question for the trier of fact.' [Citation.] 'However, whenever reasonable minds can draw only one conclusion from the evidence, the question becomes one of law.' [Citation.] Thus, when an appeal is taken from a judgment of dismissal following the sustention of a demurrer, 'the issue is whether the trial court could determine as a matter of law that failure to discover was due to failure to investigate or to act without diligence.' " (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1320; accord, *Nguyen, supra,* 229 Cal.App.4th at p. 1552.)

"In order to rely on the discovery rule for delayed accrual of a cause of action, '[a] plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence.' [Citation.] In assessing the sufficiency of the allegations of delayed discovery, the court places the burden on the plaintiff to 'show diligence'; 'conclusory allegations will not withstand demurrer.' " (*Fox v. Ethicon-Surgery, Inc.* (2005) 35 Cal.4th 797, 808, italics omitted (*Fox*).) "Simply put, in order to employ the discovery rule to delay accrual of a cause of action, a potential plaintiff who suspects that an injury has been wrongfully caused must conduct a reasonable investigation of all potential causes of that injury. If such an investigation would have disclosed a factual basis for a cause of action, the statute of limitations begins to run on that cause of action when the investigation would have brought such information to light. In order to adequately allege facts supporting a theory of delayed discovery, the plaintiff must plead that, despite diligent investigation of the circumstances of the injury, he or she could not have reasonably discovered facts supporting the cause of action within the applicable statute of limitations period." (*Id.* at pp. 808-809.)

C. Analysis

The issue presented is whether appellant sufficiently plead facts that would support a finding she could not have reasonably discovered the injury until at least six days after the procedure. (*Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d 1125, 1150 ["Whether the discovery rule applies at all is initially a matter of pleading."].) Appellant alleged in the second amended complaint that she returned to Western Dental and discovered Murphy had been terminated, and she only discovered that the procedure severely injured her jaw ridge and bone causing her dentures not to fit when she visited a different dentist. The California Supreme Court in *Fox* held that in order to rely on the discovery rule, plaintiffs must specifically allege facts showing the time and manner of

discovery and the inability to have made earlier discovery despite reasonable diligence. (*Fox, supra*, 35 Cal.4th at p. 808.) Here, appellant has alleged the time and manner of discovery. In her opening brief on appeal, she asserts it was not possible for her to discover she was injured on the date of the procedure, and she only had reason to suspect that she was injured when she returned to Western Dental and was informed that Murphy had been fired for harming other people.

Taking the entire record into consideration, it is evident the complaint can be amended to state a cause of action. Arguably, the original complaint sufficiently stated the basis for the delayed discovery by alleging that although appellant was in significant pain, she was not aware that the pain was a result of an injury until she returned to Western Dental 10 days later and was informed Murphy had been terminated for injuring other patients during prior procedures. There is no question that appellant, proceeding in propria persona and not being fluent in the English language, has not set forth her allegations of delayed discovery with perfect clarity. "[I]n propria persona litigants are not entitled to any special treatment from the courts. [Citation.] But that doesn't mean trial judges should be wholly indifferent to their lack of formal legal training." (*Gamet v. Blanchard* (2001) 91 Cal.App.4th 1276, 1285.) Moreover, in this instance, the court must assume the truth not only of the complaint's properly pleaded facts, but also of the implied factual allegations contained therein. (*Schifando v. City of Los Angeles, supra*, 31 Cal.4th at p. 1081.)

The second amended complaint does not specifically state why appellant was unable, despite reasonable diligence, to discover the injury earlier. However, the record as a whole clearly shows the contention that appellant would not have reasonably discovered the injuries until sometime after the procedure. It is reasonably probable appellant could have amended the complaint to state facts showing discovery occurred within one year prior to the filing of the original complaint. As there is a reasonable possibility that the defect in the pleading can be cured by amendment, the trial court

abused its discretion in sustaining the demurrer without leave to amend. (*Blank v. Kirwan*, *supra*, 39 Cal.3d at p. 318.)

DISPOSITION

The judgment is reversed. Appellant shall be provided leave to amend the complaint to state that it was not reasonably possible for her to discover her injuries resulting from the dental procedure before she returned to the dental office 10 days later. Appellant is entitled to her costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)